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Supreme Court of the United States.

OCTOBER TERM, 1941.

BOSTON AND MAINE RAILROAD,
Petitioner,
v.
JAMES H. CUNNINGHAM,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States of America:

The petition of Boston and Maine Railroad, a corporation duly organized by law, and having an usual place of business in Boston, respectfully shows:

Summary and Short Statement of Matter Involved.

This is an action of tort originally brought in the Superior Court for Hampden County, Commonwealth of Massachusetts, by the respondent, the plaintiff therein, to recover of the petitioner, the defendant therein, damages arising out

of an alleged accident to the respondent, the plaintiff therein, as the result of being run into by a baggage truck operated by fellow-employees. The defendant's answer was a general denial, contributory negligence, and assumption of risk. The case was tried to a jury before Judge Baker of the Massachusetts Superior Court, and the jury returned a verdict for $7500 for the respondent, plaintiff therein.

At the close of the evidence, the petitioner, defendant therein, filed a motion for a directed verdict, which motion was denied subject to the exceptions of the petitioner. The case was submitted to the jury under appropriate instructions as to negligence, contributory negligence, assumption of risk, and as to damages, to which instructions no exceptions were taken. The jury returned a verdict on October 25, 1940, for the plaintiff in the sum of $7500, but before the recording thereof the judge, who had previously expressed doubt to counsel for both parties as to the sufficiency of the plaintiff's evidence on negligence, reserved leave under G.L. (Ter. Ed.) c. 231, sec. 120, to enter a verdict for the defendant. The defendant on October 26, 1940, filed a "motion for judgment" on its motion for a directed verdict under leave reserved. The Court on November 21, 1940, endorsed upon the defendant's "motion for judgment": "After hearing, Motion allowed." The plaintiff seasonably excepted to the Court's allowance of the defendant's motion for judgment. The plaintiff seasonably filed a bill of exceptions and the case was heard by the Supreme Judicial Court of the Commonwealth of Massachusetts. In the opinion rendered by the Supreme Judicial Court, which appears in the record submitted herewith, the Supreme Judicial Court sustained the plaintiff's exceptions and by rescript left nothing for the Superior Court to do but enter judgment for the plaintiff, which was done on July 9, 1941.

Jurisdiction.

Since this is an action under the Federal Employers' Liability Act (Act of April 22, 1908, c. 159, 35 Stats. 65, U.S.C. Title 45, c. 2, sec. 51 *et seq.*), and since the case cannot be properly decided on any independent ground of local law, it is submitted that, final judgment in said case having been entered on July 9, 1941, in the Superior Court, Hampden County, Commonwealth of Massachusetts, in accordance with the rescript of the Supreme Judicial Court (Record, page 12), the jurisdiction of this Court to review said judgment is properly invoked under United States Code, Title 28, sec. 344(b). The Supreme Judicial Court of Massachusetts, in sustaining the plaintiff's exceptions to the ruling of the trial judge, in effect held that there was evidence to go to the jury on the question of the defendant's negligence. It also held that the defendant had failed to sustain its claim that the plaintiff had assumed the risk of his occupation and ignored the defendant's claim that under the rules of the Federal Court there was no credible evidence of an accident. The action of the judge of the Superior Court should have been affirmed if, under the facts of this case, and under the rules of the Federal Court, the plaintiff had failed to sustain his contentions, *first,* that there was an accident; *second,* that it was caused by negligence of the defendant, its agents or servants; and *third,* that the plaintiff had not assumed the risk of his occupation.

Questions Presented.

Whether, on the record, there is evidence to go to a jury from which the jury could find, *first,* that there was an accident; *second,* that it was caused by the negligence of the defendant, its servant or agent; *third,* that the plaintiff was

not contributorily negligent; *fourth,* that the plaintiff did not assume the risk.

Reasons for Granting the Writ.

The case here presented for review constitutes an utter and complete disregard by the Supreme Judicial Court of Massachusetts of those principles enunciated by the Supreme Court of the United States and the various Circuit Courts of Appeal in construing the provisions of the Federal Employers' Liability Act. Since it is settled that cases under the Federal Employers' Liability Act are subject to review by the Supreme Court on the entire record to determine if the evidence is sufficient, as a matter of law, to show negligence, and since it is settled that the State Courts must be governed in their interpretation and trial of cases under this Act by the decisions of the Federal Courts, the complete disregard of those decisions as evidenced by the opinion of the Massachusetts Supreme Judicial Court constitutes an invasion of the Railroad's right to have its liability determined under the Federal Act. It is therefore respectfully submitted that this case is one calling for the exercise by the Supreme Court of the United States of its supervisory powers and this Court should review the decision of the Supreme Judicial Court of Massachusetts and the Superior Court for the County of Hampden, and finally reverse it.

Wherefore it is respectfully submitted that the petition should be granted.

RICHARD W. HALL,
FRANCIS P. GARLAND,
Attorneys for Petitioner.

BRIEF IN SUPPORT OF PETITION.

Opinions Below.

No opinion was filed in the Superior Court, as the case was tried to a jury. The opinion of the Supreme Judicial Court of Massachusetts a copy of which is to be found in the Record (pages 8-11), was handed down on May 28, 1941, and is reported on page 1003 of the Advance Sheets for the year 1941.

Jurisdiction.

An action in a State Court under the Federal Employers' Liability Act presents Federal questions reviewable in the Supreme Court of the United States.

Chicago, Milwaukee & St. Paul Ry. Co. v. *Coogan*, 271 U.S. 472.

Gulf, Mobile & Northern R.R. Co. v. *Wells*, 275 U.S. 455.

Atlantic Coast Line R.R. Co. v. *Driggers*, 279 U.S. 787.

In these cases the Supreme Court of the United States has held that, where the evidence is not sufficient in kind or amount to warrant a finding that negligence of the Railroad Company caused employee's injury, a judgment for damages must be reversed. Inasmuch as there was no evidence of an accident or of injury due to negligence of the Railroad which measured up to the standards of the Federal Courts, this Court should review the case and set aside the verdict heretofore rendered.

Statement of the Case.

This is an action of tort in which the plaintiff alleged that he was injured on January 25, 1937, through the negligence of the defendant, its agents or servants. The plaintiff, admittedly engaged in interstate commerce, testified in substance that he delivered a barrel of meat into the Boston car and came out of said car onto the freight platform of the defendant's freight house at Holyoke; that, while pushing his two-wheel truck before him, he saw three fellow-employees pushing a two-wheel truck with a box on it coming towards him; that he was run into by the box on the two-wheel truck coming towards him, as a result of which he was knocked down in the space between the freight-house platform and a box car standing on an adjacent track. The plaintiff testified that he was thoroughly familiar with the rules of the defendant company, requiring that every accident, however slight, should be reported at once; that he did not report his alleged accident as required by the rules of his employment until December 30, 1937; that he was examined by his physician on February 3, 1937, and there were no marks on him; that he was admitted to the hospital on February 6, 1937, for a prostate operation; that no mention was made of an accident on his hospital record and that when he applied for insurance benefits in March, 1938, he stated on his application that no accident was involved. He further testified that he had been employed by the Railroad as a freight trucker for fifteen years and had seen many two- and four-wheel trucks passing up and down the platform in question, sometimes with boxes upon them and sometimes unloaded. On this evidence, the Supreme Judicial Court of Massachusetts decided that there was evidence of negligence on the part of the defendant, its agents or servants, and ignored the defendant's contention that there was no evidence of an accident causing injury to the plaintiff.

Specification of Errors.

The issue presented is stated in the petition.

Argument.

I.

THE FACTS OF AN ACCIDENT.

It is indeed rare that an action at law will be presented to the Court and jury without some credible evidence that there has been an accident, and consequently it is impossible to find in the Courts any authoritative decision holding that the evidence did not establish that there was an accident. However, there are certain basic rules as laid down in the decisions of the Federal Courts interpreting the Federal Employers' Liability Act, which are distinctly applicable in this case. Apart from matters of procedure not affecting such rights, the case is governed by the Federal Employers' Act, and the applicable principles of common law as established and applied in the Federal Courts. The kind and amount of evidence required to establish liability is not subject to the control of the several states. The rule applied in the Federal Court is that the credibility of witnesses, the weight and probative value of evidence, are to be determined by the jury and not by the judge. However, in every case it is the duty of the judge to direct a verdict in favor of one of the parties when the testimony and all the inferences which the jury could justifiably draw therefrom would be insufficient to support a different finding. But the question of the credibility of witnesses is one for the jury alone. This does not mean that the jury is at liberty, under the guise of passing upon the credibility of a witness, to disregard his testimony when from no reasonable point of view is it open to doubt.

Shipp v. *Boston & Maine R.R.*, 283 Mass. 266, 270.

A mere scintilla of evidence is not enough to prove a plaintiff's case, as the scintilla rule is not recognized in the Federal Courts.

> *A. B. Small Co.* v. *Lamborn & Co.*, 267 U.S. 248.
> *New York Central R.R. Co.* v *Ambrose*, 280 U.S. 486, 489.

Also it is not enough that a fair preponderance of evidence should be submitted to the jury; the evidence must be credible and not a balance of probabilities.

> *Bash* v. *Baltimore & Ohio R.R.*, 102 Fed. (2d) 48, 50:
>
> "It is a wild conceit that any court of justice is bound by mere swearing. It is the swearing credibly that is to conclude its judgment."

The rule is well established in the Federal Courts that, where a party charged with proving an allegation introduces evidence of two inconsistent facts, then he has not proved anything, and his case must fall.

> *Patton* v. *Texas & Pacific Ry. Co.*, 179 U.S. 658, 663.
> *Pennsylvania R.R. Co.* v. *Brubaker*, 31 Fed. (2d) 939, 940.
> *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Coogan*, 271 U.S. 472.

In this case now before the Court the plaintiff in his testimony at the trial stated that there was an accident on January 25, 1937. He admitted that he did not report an accident until December 30, 1937. He admitted that in his hospital record no mention was made of an accident. He admitted that in March of 1938, when he was applying for

insurance, he stated that no accident was involved. This is not the case of two witnesses testifying to opposing facts; it is the case of one witness testifying to two inconsistent facts. That being so, neither fact has been proved, and his case must fall. It is inconceivable that a claimant should deny the fact of an accident for eleven months and then testify that there was an accident after that time.

Admitting that the weight of testimony is for the jury, and that the jury may disregard any testimony, still it is a general rule that a plaintiff is bound by his own admissions. Testimony coming from the plaintiff adverse to his own case must ordinarily be accepted as true. He cannot ordinarily be heard to dispute his own allegations. Hence, in this case, the plaintiff cannot deny his own admission that he denied the fact of an accident until December 30, 1937, eleven months after the accident is said to have happened. It was not until the plaintiff discovered that his recovery from his operation would be slow and incomplete that he finally decided he had had an accident on January 25, 1937. By his failure to report an accident seasonably, the defendant was deprived of an opportunity to make an adequate investigation of the facts which he later alleged. By his failure to mention any accident in his hospital record, the plaintiff again denied the existence of an accident, and by his statement in his application for insurance benefits that "no accident was involved," he clearly and unequivocally denied the fact of any accident. As against this, two and a half years later he testified under oath that there was an accident. Under the well-known Federal rule that a plaintiff is bound to prove his case, the defendant submits that the plaintiff has failed in the first element of his case, namely, proof of an accident.

II.

The Fact of Negligence.

Under the Federal Employers' Liability Act proof of negligence on the part of the plaintiff's fellow-workmen is essential.

Pennsylvania R.R. Co. v. *Brubaker*, 31 Fed. (2d) 939.

If the employee is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony, and no mere sympathy for the victim of the accident justifies any departure from the settled rules of proof resting upon all plaintiffs. It is not sufficient for the employee to show that the employer may have been guilty of negligence; the evidence must point to the fact that he was, and where the testimony leaves the matter uncertain, it is not for the jury to guess.

Patton v. *Texas & Pacific Ry. Co.*, 179 U.S. 658.

It is this theory of the Federal law that is completely ignored by the Supreme Judicial Court of Massachusetts in its decision. The Supreme Judicial Court in its decision said: "Nothing was developed necessarily inconsistent with the plaintiff's story of the accident. There is nothing inherently impossible about that story. An accident could have occurred in the manner described. We cannot say as a matter of law that a jury could not reasonably believe the plaintiff. If they did believe him they could reasonably find that the conduct of his three fellow employees in running him down was wanting in due care. . . . It is true that the evidence does not disclose the height of the box on the truck which was being handled by the three employees. But the

jury were not obliged for this reason to assume a box of extraordinary dimensions. They could reconstruct the scene of the accident in the manner which in the light of common knowledge the evidence would naturally suggest to their minds."

This part of the decision begs the entire question. The Court states that nothing was developed necessarily inconsistent with the plaintiff's story of the accident, but the plaintiff's story itself is inconsistent. In his testimony on the stand he testified that there was an accident. As pointed out above, for nearly a year he denied the very fact of an accident. This in itself is inconsistent. The decision states that it is true that the evidence does not disclose the height of the box on the truck which was being handled by the three employees. There was no indication given on the size of the box, except that it was a large box. The Court then said: "But the jury were not obliged for this reason to assume a box of extraordinary dimensions." By this the Court implies that the jury could assume a box of any dimensions that they chose, thereby laying the very foundation of the case on assumption, and it is settled that mere assumption is not ground for submitting a case to a jury.

The Court says they (the jury) could reconstruct the scene of the accident in the manner which, in the light of common knowledge, the evidence would naturally suggest to their minds, but there is nothing to indicate that there was any common knowledge from which the jury could reconstruct the accident. There is nothing to indicate that any member of the jury or anyone else in the courtroom had any knowledge from which he could assume the size of the box on the truck or the speed of the truck while it was being operated. In fact, there is no evidence of what actually happened. The Court goes on to say: "And if none of the three men could see over or around the box the jury might have thought it negligent for them to push ahead in

the manner described down the platform where another man might be coming out of the cars." But there is nothing in the record to indicate that any of the men on the truck knew or had any reason to suppose that another man might be coming out of the cars. The record is entirely silent as to how or why, or with clearness when, the impact took place, or that it was not an ordinary incident to the work which the men were engaged in. For such lack of any substantial evidence to support the plaintiff's petition, the motion for a directed verdict should have been sustained.

Pennsylvania R.R. v. *Brubaker,* 31 Fed. (2d) 939.

It is settled that, unless the people charged with negligence saw, or in the exercise of due care should have seen, that the plaintiff was in a position of danger, in time to prevent an accident, there is no negligence.

Murray v. *Boston & Maine R.R.,* 216 Mass. 591.
Toledo, St. Louis & Western R.R. Co. v. *Allen,* 276 U.S. 165.
Chesapeake & Ohio Ry. Co. v. *Mihas,* 280 U.S. 102.
Gulf, Mobile & Northern R.R. Co. v. *Wells,* 275 U.S. 455.
Conti v. *Brockton Ice & Coal Co.,* 295 Mass. 15.

In *Toledo, St. Louis & Western R.R. Co.* v. *Allen,* 276 U.S. 165, 173, this Court has said: "In the absence of knowledge on their part that he was in a place where he was liable to be struck and oblivious of that danger, they were not required to vary the switching practice customarily followed in that yard or to warn or to take other steps to protect him."

In *Chesapeake & Ohio Ry. Co.* v. *Mihas*, 280 U.S. 102, this Court said: "There is nothing in the record to show that employees engaged in the switching operation knew or had reason to believe that Mihas was in any position of danger. In the absence of such knowledge or ground for belief, they were not required to warn him of the impending switching operation or take other steps to protect him."

Similarly, in this case, the plaintiff has not shown any knowledge or ground for knowledge that the fellow-employees who, it is alleged, struck him with the truck knew or in the exercise of due care should have known that the plaintiff was on the platform. It does not appear from the record that this was a usual movement or one to be reasonably anticipated by the operators of the loaded truck, assuming that there were such operators. It does not appear that they operated the loaded truck in any unusual manner, or at any unusual rate of speed, or on any unusual route. There is nothing to show what caused the accident, if there was an accident. As against this, it must be realized that for nearly a year the plaintiff made no claim of any accident, but three times expressly denied the existence of an accident, and it must be obvious that he is merely trying to recoup the losses caused by his operation. There was no evidence of any negligence on the part of the defendant, its agents or servants.

III.

Contributory Negligence.

On the record as it stands, the plaintiff would have us believe that he saw the other truck coming towards him in plenty of time to get out of the way; that there was plenty of room on the other side of the platform, but that, notwithstanding this, he backed up against a car where he could not step aside if it became necessary. In other words, the

plaintiff tells us in so many words that he deliberately stayed in a place of danger when he had an opportunity to get out of the way of danger, which he knew to be approaching. It must have been obvious to him that those operating the truck which he says hit him did not know of his presence. In this respect he is very much in the position of the operator of a hand car or any other member of a track crew, and it is settled that members of a track crew may not expect those in charge of a train to look out for them.

Chesapeake & Ohio Ry. Co. v. *Nixon,* 271 U.S. 218.

Toledo, St. Louis & Western R.R. Co. v. *Allen,* 276 U.S. 165.

Central Vermont Ry. v. *Sullivan,* 86 Fed. (2d) 171.

IV.

The Assumption of Risk.

The plaintiff testified that he knew trucks, both large and small, were going up and down the platform every day and all the time and had been doing it for years, and that he had seen them (Record, page 4). The danger of coming into contact with such a truck at some time or other must have been obvious to him. As the Circuit Court of Appeals for the Second Circuit said in one case: "While we think that the danger in this case was patent, it is proven that it was known and long had been known to the plaintiff below. That it was a danger did not require the teaching of the event. Therefore, it was a present risk and therefore, it was assumed."

McAdoo v. *Anzellotti,* 271 Fed. 268.

In several cases it has been held that the danger was so clear that the decedents must have known of the danger, and that to allow the jury to find a verdict for the plaintiffs was to allow them to substitute sympathy for evidence and to impose a standard of conduct that had no warrant in the common law.

Southern Pacific Co. v. *Berkshire,* 254 U.S. 415.
Northwestern Pacific R.R. Co. v. *Bobo,* 290 U.S. 499.

The case of *Northwestern Pacific R.R. Co.* v. *Bobo,* 290 U.S. 499, is very similar to this case. In that one the plaintiff's intestate had apparently been killed by falling off some slippery steps leading onto a bridge where his duties took him. The Supreme Court of the United States stated: "The deceased had gone up and down these open stairs very many times from August to February. He had a proper lantern by the light of which he could easily see the alleged defects. He must have been aware that moisture frequently accumulated. Also, often during the summer and early autumn there was adequate sunlight before five o'clock A.M. to disclose the real conditions. No suggestion is made of any complaint to the Company concerning the stairs or platform. We think the record discloses enough to show that the decedent assumed any alleged risk."

This statement by the Supreme Court is particularly applicable to the case now being presented. The injured man had been up and down that platform many, many times for fifteen years; he must have been aware, and testified that he knew, that trucks frequently passed up and down that platform. No suggestion is made of any complaint to the company concerning the platform or the way the trucks were operated. The petitioner feels that the plaintiff, respondent

here, had assumed the risk and, having assumed the risk, could not recover even if there was evidence of negligence on the part of the Railroad.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1941

No. 664

BOSTON AND MAINE RAILROAD,
Petitioner

vs.

JAMES CUNNINGHAM,
Respondent

RESPONDENT'S BRIEF

This is a petition for a Writ of Certiorari to review the decision of the Supreme Judicial Court of Massachusetts in an action of tort under the Federal Employers' Liability Act (45 U. S. Code Annotated, Sections 51 to 59) for personal injuries sustained by an employee (the respondent herein) engaged in interstate commerce, of an interstate common carrier by railroad.

STATEMENT OF FACTS

The facts in this case are clearly set forth in the "Transcript of Record" on Pages 2, 3, 4 and 5.

MISSTATEMENTS IN FACTS SET OUT IN PETITIONER'S PETITION AND BRIEF

On Page 2 of Petition, line two refers to "a baggage truck operated by fellow employees."

The Record, Page 2, fourth paragraph, line six says "That he saw three fellow employees pushing a two-wheeled truck with a box on it," etc.

On Page 2 of Petition, line 3—"The defendant's answer was a general denial, contributory negligence and assumption of risk."

The Record, Page 7, shows the answer to be a general denial and contributory negligence.

On Page 2 of Petition, last line, and Page 3, line six, it is stated that judgment was entered on July 9, 1941.

The Record, Page 12, "Certificate of Judgment" sets forth that judgment was entered on July 7, 1941.

On Page 6 of Brief in Support of Petition, line sixteen, it appears "that he did not report his alleged accident as required by the rules of his employment until December 30, 1937; on Page 8 of said Brief in Support of Petition, last paragraph, line three, it again appears "He admitted he did not report an accident until December 30, 1937;" on Page 9 of said Brief in Support of Petition, second paragraph, line eight, it again appears "he denied the fact of an accident until December 30, 1937, eleven months after the accident is said to have happened"; on Page 11 of said Brief, second paragraph, line five it again appears

"As pointed out above, for nearly a year he denied the very fact of an accident"; on Page 13 of said Brief, second paragraph, line twelve, it again appears "As against this, it must be realized that for nearly a year the plaintiff made no claim of any accident."

The respondent respectfully says that no where in the "Transcript of Record" does any such statement appear.

On Page 6 of Brief in Support of Petition, line twenty-one, it appears "that no mention was made of an accident on his hospital record"; on Page 8 of said Brief in Support of Petition, last paragraph, line four, it again appears "He admitted that in his hospital record no mention was made of an accident; on Page 9 of said Brief in Support of Petition, second paragraph, line fifteen, it again appears "By his failure to mention any accident in his hospital record."

The record, Page 4, last paragraph, line eight, is an explanation by the family physician as follows: "his family physician testified that the reason he did not include it in the hospital record was because the plaintiff requested him not to do so as he (plaintiff) said he was afraid he would be fired if it was so included in the hospital record.

On Page 11 of Brief in Support of Petition, second paragraph, line eleven, it is said "it was a large box."

The respondent submits that there is no such statement in the Record and calls the attention of the Court to the Record, Page 4, top of page.

"A. The truck come down, the box was probably about that long over the shafts."

The respondent by this statement illustrated to the jury the size of the box.

ISSUES

I. ON THE "TRANSCRIPT OF RECORD" SHOULD AN ORDER DENYING CERTIORARI BE ENTERED?

II. WAS THERE SUFFICIENT EVIDENCE OF NEGLIGENCE TO GO TO THE JURY?

III. DID THE RESPONDENT ASSUME THE RISK?

ARGUMENT

I. ON THE "TRANSCRIPT OF RECORD" SHOULD AN ORDER DENYING CERTIORARI BE ENTERED?

The respondent submits that on the "Transcript of Record" an order denying Certiorari should be entered.

The respondent submits that the province of this Honorable Court is to decide as a matter of law whether on the record certiorari should be granted.

Chicago, Milwaukee & St. Paul Ry. Co. vs. Coogan 271 *U. S.* 472.

In this connection the respondent calls to the attention of the Court, the Record, Page 1, third paragraph, line three, which says: "The case was submitted to the jury under appropriate instructions as to negligence, contributory negligence, assumption of the risk and as to damages to which instructions no exceptions were taken." The Court properly instructed the jury as to negligence, contributory negligence, assumption of the risk and as to damages under the Federal law with reference to the Federal Employers' Liability Act.

The respondent submits that the Record clearly shows that as a matter of law an order denying certiorari should be entered.

II. WAS THERE SUFFICIENT EVIDENCE OF NEGLIGENCE TO GO TO THE JURY?

The respondent submits in answer to petitioner's Petition, Page 3 entitled "Questions Presented" as to whether "there was an accident," as to whether "it was caused by the negligence of the defendant, its servants or agents," as to whether "the plaintiff was not contributorily negligent" and as to whether "the plaintiff did not assume the risk" were all questions of fact for the jury.

As to the first "Question Presented":

1. Was there an accident?

The Record on Pages 2 and 3 set forth that there was an accident, not only that the respondent was struck by his three fellow employees but Page 3, line eight, "The plaintiff was pulled back up upon the platform by the said three fellow employees." On Page 4, fourth paragraph—"The defendant offered no explanation as to how the accident happened." The respondent submits that this was a question of fact for the jury, and, the jury could find, in addition to the above stated reasons, that by virtue of the fact that the petitioner offered no evidence to explain this accident (Record, Page 4), although the explanation, if any, was within the control of the petitioner's three employees, the only fair inference to be drawn by the lack of explanation being that there was no explanation and no other cause for the accident except the carelessness and negligence of petitioner's employees.

As to the second "Question Presented":

2. Whether it was caused by the negligence of the defendant, its servants or agents?

Negligence has been defined to be the absence of care according to the circumstances and is always a question for the jury when there is reasonable doubt as to the facts, or as to the inferences to be drawn from them. When the measure of duty is ordinary and reasonable care, and the degree of care varies according to circumstances, the question of negligence is necessarily for the jury.

Warner vs. Baltimore & Ohio—168 *U. S.* 339 *at* 348.

Negligence only becomes a question of law to be taken from the jury when the facts are such that fair-minded men can only draw from them the inference that there was no negligence. If fair-minded men, from the facts admitted, or conflicting testimony, may honestly draw different conclusions as to the negligence charged, the question is not one of law but of fact and to be settled by the jury under proper instructions.

McDermott vs. Severe—202 *U. S.* 600 *at* 604.

In the case of Moran vs. Plymouth Rubber Company—307 Mass. 344, which case also involved a two-wheel hand truck, the Court upheld the plaintiff on the question "whether there was evidence to go to the jury."

The respondent in the case at bar submits that the evidence of defendant's employees' negligence is stronger than the Moran Case. The respondent submits that there was enough to support a finding that the respondent's injury was caused by negligence of the defendant's employees. The two-wheeled hand truck which struck the respondent (Record, Page 3) was of such size, shape and construction that it could be handled with reasonable

facility and could be turned or stopped to meet such conditions as would be likely to arise where workmen were about. The jury could infer that if the respondent saw his fellow employees pushing their truck eighty feet away in his direction that the employees could have seen the respondent and had sufficient time to stop or continue on their right-hand side of the platform instead of changing their course, speeding up, crossing to respondent's side of platform and crowding in on the respondent thereby pushing their truck against him.—Record, Pages 2 and 3.

The respondent further submits that the jury could find that the petitioner's employees had an unobstructed view of all that was happening in front of them; that they could have seen the respondent in front of them on the platform; that from all the evidence the jury could infer that the petitioner's employees were negligent either in failing to observe the respondent or in failing to stop or in pushing their truck too fast or too near the respondent.

In the case of Illinois Central Railroad Co. vs. Porter—207 Fed. 311 at 314, a somewhat similar set of facts existed as in the case at bar, involving a trucker of a railroad engaged in similar work as the respondent in this case. The Court held—"The evidence was sufficient to support a conclusion that the fellow truckman negligently collided with decedent."

The above case was followed in Grosvenor vs. New York Central Railroad Co.—343 Missouri 611 at 621.

As to the third "Question Presented":

3. Whether the plaintiff was not contributorily negligent?

On the question of contributory negligence the respondent submits that on the Record there is no evidence of

contributory negligence and if the plaintiff was guilty of contributory negligence, which is expressly denied, under the Federal Employers' Liability Act it would only lessen the amount of respondent's damages.

III. DID THE RESPONDENT ASSUME THE RISK?

The respondent submits that he did not assume the risk.

The respondent submits that the doctrine of assumption of the risk under the Federal Employers' Liability Act is clearly set forth by the Massachusetts Supreme Judicial Court as follows:—

"But there is no voluntary assumption of the risk of the carelessness of a fellow servant, not obvious nor fully known and appreciated by the plaintiff in season to enable him to judge of the danger and to decide whether to assume the risk involved."

Hietala vs. Boston & Albany Railroad—295 *Mass.* 186 *at* 192.—*certiorari denied* 299 *U. S.* 589.

Hanley vs. Boston & Maine Railroad—286 *Mass.* 390 *at* 397.

Illinois Central Railroad vs. Porter—207 *Fed.* 311 *at* 315.

Texas & Pacific Railroad vs. Behymer—189 *U. S.* 468 *at* 470.

The respondent submits that the petitioner offered no evidence of an assumption of the risk except what appears in Record, second and third paragraphs of Page 4.

CONCLUSION

Upon the "Transcript of Record" and the law applicable thereto the respondent submits that the cause here presented for review does not constitute "an utter and complete disregard by the Supreme Court of Massachusetts of those principles enunciated by the Supreme Court of the United States"—"in construing the provisions of the Federal Employers' Liability Act" as set forth in Petition for Writ of Certiorari Page 4 entitled "Reasons for Granting the Writ" but demonstrates definitely in its Opinion (Record, Pages 8, 9, 10 and 11) an intelligent compliance and understanding of the principles involved.

The respondent respectfully submits:—

1. That on the "Transcript of Record" an order denying Certiorari should be entered.
2. That there was sufficient evidence of negligence to go to the Jury.
3. That the respondent did not assume the risk.

WHEREFORE, the respondent respectfully prays that the Petition for a Writ of Certiorari be dismissed and an Order Denying Certiorari be entered.

Respectfully submitted,

JAMES CUNNINGHAM,

Respondent-Pro-Se.